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No. 84-453

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

WALTER McCOVEY, JR., and LANCE R. WILKIE,
Respondents.

On Writ of Certiorari to the California Supreme Court

AMICI CURIAE BRIEF OF STATES OF ALASKA, ARIZONA, IDAHO, MONTANA, NEVADA, OREGON, NORTH DAKOTA, AND SOUTH DAKOTA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *amici* brief is limited to the following questions:

1. Whether, and to what extent, the states have the right to regulate off-reservation Indian activity.

2. Whether the states have regulatory jurisdiction over navigable waters flowing across Indian country, where the state acquired title to the waters upon admission to statehood and where an Indian reservation was created on adjacent lands after the state's admission to statehood.

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INTEREST OF AMICI CURIAE

Although this case arises from a State court decision that lacks binding effect outside the State, the western states named herein as *amici curiae* have a substantial interest in the issues presented in the case. The *amici* states have large quantities of navigable waters located within their borders,[1] and substantial portions of their lands have been set aside by the federal government as reservations

[1]The western states contain several thousands of miles of navigable waterways. For example, the Columbia, Snake, Willamette, Sacramento, Klamath, Colorado and Yellowstone Rivers, all of which are navigable, have a total volume of more than 250 million acre-feet of water annually. See State of California, *California Water Atlas*, at 3 (1979).

for Indian purposes. The *amici* states therefore have an interest in questions concerning the relationship of the states to their Indian citizens, and in questions concerning the scope of state jurisdiction in navigable waters. Where, as in this case, both questions are presented in the same case, the interest of the *amici* states is especially profound.

The *amici* states' interest particularly applies to two issues arising out of the California Supreme Court decision, and the *amici* brief will be limited to these two issues. First, the California Supreme Court decision holds that federal regulations preempt California laws as applied to off-reservation Indian conduct, even though there is no clear conflict between the federal regulations and California law. By its willingness to construe the federal regulations as having a preemptive effect, even in the absence of a conflict between federal and state policies, the lower court departed from this Court's decisions holding that state laws are applicable to off-reservation Indian conduct unless such state laws are "expressly" contrary to federal law. See, *e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). The lower decision thus poses a disturbing threat to the traditional state-tribal relationship with respect to off-reservation Indian conduct.

Second, the California Supreme Court decision, in holding that California cannot prohibit Indian commercial fishing in the Klamath River, is logically supportable only by the conclusion that the states lack full sovereign control of their navigable waters. This Court has consistently held, however, that the Equal Footing Doctrine vests the western states with full jurisdiction over their navigable waters, including fisheries therein, subject only to federal navigation powers and federal "reserved" water rights. See, *e.g.*,

United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1890). Neither limitation applies here. Therefore, the California Supreme Court decision lacks a constitutional or jurisdictional basis. The decision, if allowed to stand, poses a distinct threat to the western states' sovereign interests in navigable waterways.

For the above reasons, the *amici* states believe that this case presents truly historic issues concerning state jurisdiction over navigable waters and over off-reservation Indian conduct, and therefore should be reviewed by this Court.

REASONS FOR GRANTING THE WRIT

A. The States Have the Right to Regulate Off-Reservation Activity of their Indian Citizens

This Court has consistently held that, notwithstanding any limitations on state jurisdiction over on-reservation activities of their Indian citizens, a state may fully apply its nondiscriminatory laws to their off-reservation activities unless such application is contrary to "express" federal law. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *New Mexico v. Mescalero Apache Tribe*, ... U.S. ....., 103 S.Ct. 2378, 2387 n. 18 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n. 11 (1980); *Ward v. Race Horse*, 163 U.S. 504 (1896). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." *Mescalero Apache Tribe v. Jones, supra*, 411 U.S. at 148-149. Thus, although Indians are largely free of state laws when on the reservation, particularly where state

law conflicts with federal policy or tribal self-government, Indians are subject to the full panoply of state laws when they leave the tribal homeland and become part of non-Indian society. This rule accommodates the various tribal, state and federal interests by distinguishing between on- and off-reservation Indian activity.

In the present case, the proscribed activity, as well as the accompanying arrests, took place hundreds of miles from the reservation. The fish sales violated not only California law, but also regulations adopted by the Secretary of the Interior prohibiting Indian commercial fishing. Thus, California law is not in conflict with any relevant federal regulation, policy, or interest. Moreover, any relevant tribal interest could have been satisfied by fish sales on the reservation, assuming that the respondents have the right to commercially fish. Therefore, no federal or tribal policy stands in the way of California's regulatory efforts here. There is simply no basis for departing from the customary rule that state law applies to off-reservation Indian activity.

The California Supreme Court decision departs from this well-recognized rule by holding that the Secretary of the Interior's regulations preempt California law even as applied to off-reservation sales. As noted above, the Secretary's regulations do not conflict with California law, because both prohibit Indian commercial fishing in all forms. Moreover, the record shows that the Secretary has instructed federal agencies to assist and cooperate with State officials who prosecute Klamath River Indians for violations of State law. Pet. App. 64. In the face of the record, the California Supreme Court too easily presumed not only that Indian fishing rights necessary encompass commer-

cial rights,[2] but also that the Secretary's regulations oust California from its usual and customary jurisdiction over off-reservation Indian conduct. Even under ordinary preemption analysis, federal law preempts state law only where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963), quoting from *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).[3] Here, California law poses no "obstacle" to congressional objectives because it effectuates the same policy as the Secretary's regulations, which is to prohibit Indian commercial fishing.

Additionally, it is doubtful that the Secretary should be deemed to have authority to preempt state laws as applied to off-reservation Indian activity unless Congress clearly delegates such authority to him, or unless the federal or

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[2]Even assuming that Indians may have the right to fish for subsistence purposes under federal law, this right does not necessarily include the right to fish for commercial purposes, particularly where the Indian tribe lacks a tradition of commercially fishing. The California Supreme Court decision, although holding that "the creation of a reservation for Indian purposes encompasses the right to fish on the reservation," Pet. App. 21 n. 22, is devoid of any analysis whether the Indian tribe in question traditionally fished for commercial purposes.

[3]Because of the tradition of tribal sovereignty, the usual preemption analysis does not apply in determining the applicability of state laws to *on*-reservation Indian conduct. See, *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980). On the other hand, state laws apply to *off*-reservation Indian conduct unless contrary to "express" federal law. See, *e.g., Mescalero Apache Tribe v. Jones, supra,* 411 U.S. at 148-149. Thus, where off-reservation activity is involved, state laws presumptively apply to Indian conduct without the usual preemption analysis, and would therefore apply, *a fortiori,* where the state law does not pose an "obstacle" to congressional objectives.

tribal interest cannot be otherwise served. The dynamics of the federal, state and tribal relationship, which weigh in favor of preemption of state laws as applied to on-reservation conduct, clearly change when the Indians leave the reservation. In this situation, the state has a compelling interest in uniform application of its laws to all citizens within its borders. Concomitantly, the tribal interest is diminished, since any relevant tribal interest can be pursued on the reservation. Here, for example, there is no indication that the respondents could not have sold fish on the reservation, which is intersected by a major north-south highway running through California. Although the respondents' profits are doubtlessly maximized by off-reservation sales, there is no indication that they could not have made a reasonable profit selling fish on the reservation. Under these circumstances, California's interests would seem to clearly outweigh any competing federal or tribal interests, even assuming, contrary to the record, that these interests are in competition. The California Supreme Court decision, in going in the opposite direction, signifies a truly unprecedented departure from settled principles of federal Indian law established by this Court.

B. The States Have the Sovereign Power Under the Equal Footing Doctrine to Regulate Navigable Waters, and This Sovereign Power Cannot be Encumbered by the Subsequent Creation of Indian Reservations

In its petition, California asserts that, under the Equal Footing Doctrine, it acquired sovereign jurisdiction over the Klamath River, a navigable waterway, upon California's admission to statehood. Pet. 12-15. California also asserts that the presidential executive order creating the

reservation, by recognizing California's sovereign interests, purposefully did not include the river in the reservation. Pet. 15-17. If either argument is correct, California would have the right to regulate the commercial *taking* of fish in the river, not just sales of fish elsewhere in the State. Under these circumstances, both the taking and the sales would have occurred off the reservation. And, therefore, the Secretary of the Interior would lack authority to preempt California laws prohibiting the commercial taking of fish, even assuming that he meant to do so. California's arguments are relevant and significant, for, assuming their correctness, the California Supreme Court decision lacks a constitutional basis in concluding that California cannot regulate Indian commercial fishing here.

Turning to the merits, the Equal Footing Doctrine provides that California and other western states acquired sovereign right, title and interest in their navigable waters and underlying beds upon admission to statehood. See, *e.g.*, *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845); *Shively v. Bowlby,* 152 U.S. 1, 11-18, 49-50 (1894); *United States v. Texas,* 339 U.S. 707, 716-718 (1950); *Manchester v. Massachusetts,* 139 U.S. 240, 259-262 (1891). In *United States v. Texas, supra,* this Court stated:

> "[U]pon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." 339 U.S. 707, 717 (1950), quoting from *United States v. Oregon,* 295 U.S. 1, 14 (1935).

More recently, this Court declared:

> "[U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

As California points out in its petition, the U.S. Attorney General issued an opinion in 1891 supporting the view that California now asserts before this Court. Pet. 14, & Pet. App. 58-59. The opinion, indeed, arose in the context of the very Indian reservation in this case. The opinion notes that, although the federal government retained power to regulate navigation, California acquired sovereign control of the waters of the Klamath River upon its admission to statehood in 1850. *Id.* The opinion concludes that the fisheries in the river "remain under the exclusive control of the State," and that the reservation cannot lawfully include the river itself. *Id.* The President apparently acted in reliance on the Attorney General opinion in issuing the executive order creating the Indian reservation in this case. Pet. 17.

State sovereign interests acquired under the Equal Footing Doctrine extend to fisheries in navigable waters. See *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876); *Manchester v. Massachusetts*, 139 U.S. 240, 259 (1891); *Shively v. Bowlby*, supra, 151 U.S. at 11. In *McCready*, this Court stated:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its

> jurisdiction, unless they have been granted away. [Citations omitted.] In like manner, *the States own* the tide-waters themselves, and *the fish in them,* so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. [Citation omitted.] The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State,* which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation." 94 U.S. at 394 (emphasis added).

Therefore, state interests in navigable waters include title to and regulatory authority over fisheries, subject only to the federal power to regulate navigation. In fact, the U. S. Attorney General relied on the above-quoted language from *McCready* in concluding in 1891 that California acquired sovereign control of the Klamath River fishery here. See Pet. 15.

The states' sovereign powers under the Equal Footing Doctrine are not, however, without limitation. Beyond the fact that the states may not impair the federal power to regulate navigation, state interests in navigable waters are subject to proprietary rights conveyed by the federal government during the pre-statehood period. See *Montana v. United States,* 450 U.S. 544, 551-552 (1981); *United States v. Holt State Bank,* 270 U.S. 49, 54-55 (1926); *Chocktaw Nation v. Oklahoma,* 397 U.S. 620 (1970). Therefore, Indian

fishing rights granted by pre-statehood treaties cannot be abridged by state law. See *United States v. Winans,* 198 U.S. 371 (1905). Still, there is a strong presumption against pre-statehood conveyances that limit the states' sovereign interests in navigable waters. This Court has stated:

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Texas, supra,* 339 U.S. at 717, quoting from *United States v. Oregon, supra,* 295 U.S. at 14. See also *Montana v. United States, supra,* 450 U.S. at 552.

The pre-statehood conveyance limitation does not appear to apply in this case. The Indian reservation here was created well after California was admitted to statehood in 1850. The federal power to convey proprietary interests in navigable waters expires upon the state's admission to statehood. See *Shively v. Bowlby, supra,* 152 U.S. at 29-50 (the federal power exists "during the period of territorial government"); *United States v. Holt State Bank, supra,* 270 U.S. at 54 (the United States can convey interests to Indian tribes "after acquiring the territory and before the creation of the state"); *United States v. Winans, supra,* 198 U.S. at 383 (the federal government can convey Indian fishing rights "so long as [the Territories] . . . remain in territorial condition"). Therefore, the federal government did not have the power to grant commercial fishing rights here at the time of the reservation's creation, even assuming that it meant to do so.

Another limitation on state sovereign interests in navigable waters is found in the reserved rights doctrine, under which the federal government possesses water rights to satisfy the purposes of reserved federal lands. See, *e.g.*, *Cappaert v. United States,* 426 U.S. 128 (1976); *United States v. New Mexico,* 438 U.S. 696 (1978). The reserved rights doctrine does not apply in this case, because the dispute is over fishery regulation rather than water rights. Further, it would be improper to extend the reserved rights doctrine to include fishery regulation. Otherwise, the federal government would be able to indirectly claim "reserved" rights over resources which cannot be directly "conveyed" during the post-statehood period, which would emasculate this Court's decisions holding that the federal government cannot "convey" proprietary rights during the post-statehood period. See, *e.g., Montana v. United States,* 450 U.S. at 552. Under this result, the federal government would be able to assert claims over resources in navigable waters that have been long recognized as belonging to the states. The logic of the reserved rights doctrine does not permit its extension here.

Although the California Supreme Court decision does not specifically consider the Equal Footing Doctrine issue, California properly raised the issue below and thus the issue is properly before this Court. More importantly, the lower decision, by holding that California cannot regulate the taking or selling of fish, simply lacks a constitutional basis. For, since California acquired sovereign control of the Klamath River fishery upon its admission to statehood, the Secretary of the Interior cannot lawfully adopt regulations preempting California laws, even assuming that he meant to do so. Therefore, the lower decision can be sustained only

by rejection of California's constitutional arguments. Clearly a state court cannot deprive this Court of its power to review significant constitutional questions by the simple expedient of refraining from deciding such questions, particularly where the lower decision can only be sustained by the conclusion that the state lacks constitutional power to do what it attempts to do.

CONCLUSION

The California Supreme Court decision here significantly changes several basic Indian law principles long settled by this Court. The decision enlarges and extends the immunity of Indians from state laws even when they leave the tribal reservation and enter the mainstream of non-Indian society. The decision, on the other hand, narrows and limits the states' sovereign control of their navigable waters under the Equal Footing Doctrine. Many significant issues are presented in this case, involving the relationship of federal and state power over navigable waters and involving state powers over off-reservation Indian activity. This case affords a unique opportunity for this Court to review these questions in relation to each other rather than in isolation. The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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